



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 12567238

Date: DEC. 22, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a rehabilitation facility, seeks to employ the Beneficiary as a rehabilitation services manager. It requests classification of the Beneficiary as an advanced degree professional under the second preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This immigrant visa category allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish its ability to pay the proffered wage to the Beneficiary. The Petitioner appealed the Director's decision. We dismissed the appeal, affirming the Director's conclusion that the Petitioner had not established its ability to pay the proffered wage. The matter is now before us on a combined motion to reopen and reconsider.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. We will dismiss the Petitioner's motion to reopen and motion to reconsider and the petition will remain denied.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification

application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is December 7, 2017.

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. MOTIONS TO REOPEN AND RECONSIDER

The regulation at 8 C.F.R. § 103.5 permits affected parties to file motions to reopen and motions to reconsider on unfavorable decisions. A motion requests a review by the same authority that issued the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii). This matter is properly before us because it is a motion to reopen and reconsider our decision dismissing the Petitioner's appeal.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen. The new facts must also be relevant to the grounds of the unfavorable decision. A motion to reconsider must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We will not consider new facts or evidence in a motion to reconsider. A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

III. ABILITY TO PAY

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).¹

¹ If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had the ability to pay the proffered wage to each beneficiary. See *Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition approval where the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until the other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'I Comm'r 1967).

In this case, the proffered wage is \$122,179 and the priority date is December 7, 2017. On the petition, the Petitioner claims to have been established in 2015, employ seven workers, and have a gross annual income of approximately \$2 million.

The Director's decision stated that the Petitioner did not establish that it had paid any wages to the Beneficiary and that the Petitioner's 2017 tax return did not establish that the company had sufficient net income or net current assets to pay the proffered wage.² The Director also concluded that the Petitioner did not establish that the \$108,000 salary that it had purportedly paid to another employee could now be applied towards the Beneficiary's proffered wage. Considering the totality of the circumstances, the Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date of the petition. Our subsequent decision dismissing the Petitioner's appeal affirmed the Director's decision.

On motion, the Petitioner again claims that the \$108,000 salary it had purportedly paid for a now-vacated nurse practitioner position plus the \$48,000 wage it claims to pay the Beneficiary exceeds the proffered wage. The motion contains a previously submitted letter from the Petitioner's Administrator, stating that "the Nurse Practitioner position is currently vacant in this company." The motion also contains a May 2020 bank account statement showing an ending balance of \$140,117.68,³ a partial copy of the Beneficiary's 2019 Form W-2, Wage and Tax Statement, showing wages paid of \$48,291.78, and the company's 2018 tax return showing net income of -\$3,031 and net current assets of \$9,143.

Regarding the motion to reconsider, the Petitioner has not made specific arguments to establish that our decision was based on an incorrect application of law or policy and that our decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Therefore, the Petitioner's motion to reconsider is dismissed for failing to meet the requirements of 8 C.F.R. § 103.5(a)(3).

Regarding the motion to reopen, the Petitioner has not submitted new evidence that establishes its ability to pay the proffered wage from the 2017 priority date. The documents submitted with the motion to reopen do not establish that the Petitioner had sufficient net income or net current assets to pay the proffered wage from 2017 until the present. The Petitioner has not established that it paid the Beneficiary a salary that would meet or exceed the proffered wage, even when considered in tandem

² The labor certification states that the Petitioner has employed the Beneficiary since August 2015.

³ A bank statement shows funds in an account on a given date but does not show the sustained ability to pay a proffered wage. While the regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) such as the Petitioner tax return is inapplicable or otherwise paints an inaccurate financial picture. The Petitioner's cash would be captured on Schedule L of its tax returns and would be considered when calculating its net current assets for 2020.

with its net income and net current assets. The Petitioner has not submitted new evidence to establish that it paid a former nurse practitioner \$108,000; or to establish that the nurse practitioner is no longer with the company; or that another nurse practitioner has not been hired, or would not need to be hired, to replace the former employee.⁴ Instead, the motion contains a previously submitted letter from the company's administrator. Therefore, the Petitioner has not satisfied the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2).

IV. CONCLUSION

The Petitioner's motion to reopen does not state new facts supported by documentary evidence that establish its ability to pay the proffered wage; and the Petitioner's motion to reconsider does not establish that our prior decision was based on an incorrect application of law or policy. Motions that do not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

⁴ The Petitioner has not explained why we should consider the salary of a former nurse practitioner when determining its ability to pay the proffered wage. The Beneficiary will not be working as a nurse practitioner for the Petitioner. In addition, a nurse practitioner would presumably generate income for the Petitioner whereas it does not appear that the Beneficiary would do so in the offered management position.